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No. 01-226

In The

Supreme Court of the United States

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an airport proprietor, pursuant to the proprietary powers exception, 49 U.S.C. § 41713(b)(3), and the Supremacy Clause of the United States Constitution, U.S. Const. Article VI, cl. 2, may ban an aeronautical use at its airport, such as scheduled passenger service, as necessary for the safe operation of its airport or to serve the civil aviation needs of the public, when the airport proprietor is expressly granted such power by federal regulation and federal grant agreement and when the aeronautical use had not previously operated at the airport.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Arapahoe County Public Airport Authority ("Airport Authority") respectfully submits its Reply Brief in Support of its Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court should grant the Airport Authority's Petition for Writ of Certiorari for the following reasons. First, on the same basic facts, there is a direct conflict between the decisions of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") and the Colorado Supreme Court on the proprietary power of the Airport Authority to ban scheduled passenger service and whether such ban violates grant assurances given by the Airport Authority to the Federal Aviation Administration ("FAA"). The essence of the conflict is the Airport Authority's power to ban scheduled passenger service, when it has never allowed such service and does not have the facilities, including security, for such service. The Airport Authority respectfully submits that never has the time been so relevant, with the conflict so clear, for a decision from the Court on this issue. Second, a standard should be established by this Court by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of local, proprietary power and right. This Court has never rendered a decision pertaining to the proprietary powers statute, 49 U.S.C. § 41713(b)(3). Further, legislative history supports that, as opposed to operation of aircraft,

matters pertaining to the ground space of an airport, e.g., determining the sufficiency of facilities for scheduled passenger service, are within the proprietary powers and rights of the local airport operator. The FAA has been encroaching into this area traditionally reserved for airport proprietors. This encroachment manifested itself in the FAA seeking to impose scheduled passenger service at Centennial Airport when the facilities for such service do not exist.

ARGUMENT

1. The Petition For Writ Of Certiorari Of The Airport Authority Should Be Granted Because Of The Conflicting Decisions Of The Tenth Circuit And The Colorado Supreme Court On The Proprietary Powers Statute.

The Brief for the Federal Respondent in Opposition ("Brief in Opposition") focuses on the factual record of the FAA proceeding, thereby seeking to avoid addressing the basis for the filing of the Airport Authority's Petition for Writ of Certiorari – the direct conflict between the Tenth Circuit and Colorado Supreme Court opinions on a federal question.[1] The federal question is whether the Airport Authority may ban scheduled passenger service,

[1] This Court's Rule 10(a) specifies that one of the reasons this Court considers in exercising its judicial discretion to grant a petition for writ of certiorari is whether a United States Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." Sup. Ct. R. 10(a).

based on the proprietary powers exception to preemption, which exception is codified at 49 U.S.C. § 41713(b)(3), when adequate facilities, including security for such service, do not exist and when such service has never been allowed at Centennial Airport. On the same basic facts, the Colorado Supreme Court ruled in favor of the Airport Authority and the Tenth Circuit ruled against the Airport Authority. See Airport Authority's Petition for Writ of Certiorari ("Petition") at 10-11.

The Airport Authority submits that the direct conflict between the Tenth Circuit and the Colorado Supreme Court is indisputable. The Colorado Supreme Court opinion best defines the conflict: "The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." (citation omitted). *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 595 (1998) (App. at 80-81). It remains a question, of course, whether this Court will exercise its judicial discretion and resolve the conflict. However, in view of the unspeakable events of September 11, 2001, never has the time been so relevant, with the conflict so clear, for a decision from the Court on this issue. The Airport Authority's position is that because it does not have the facilities, including security and baggage facilities, and it has never allowed scheduled passenger service, it may ban such service, as necessary for the safe operation of the airport.

2. Why A Standard Is Necessary Which Delineates Between The FAA's Regulation Of The Operation Of Aircraft And An Airport Proprietor's Regulation Of Its Ground Space.

The FAA questions why it is necessary for this Court to set a standard by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of local proprietary power. The FAA argues that it is unnecessary because there is little indication that the lower courts need such assistance and this Petition is not the appropriate vehicle because the Airport Authority failed to meet its burden of proof in the FAA proceeding. FAA Brief in Opposition at 20.[2] The Airport Authority disagrees.

The Airport Authority understands that the granting of certiorari is a matter of this Court's discretion. The Airport Authority acknowledges that the issue may appear narrow, but submits that it is of great significance. It involves an airport proprietor's power and right to ban the origination of scheduled passenger service when it does not have the facilities, including security, for such service. The Airport Authority, accordingly, submits there are several reasons why this Court should exercise its

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[2] In the absence of the conflict between the Tenth Circuit and the Colorado Supreme Court, there may have been an issue whether the FAA's interpretation of the proprietary powers exception is to be reviewed *de novo* or with deference, but, in all events, the Airport Authority submits, it is a legal and not a factual issue. *See American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 804-805 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000).

judicial discretion to grant the Petition and proceed to set the standard.

First, this Court has never addressed the proprietary powers exception, 49 U.S.C. § 41713(b)(3), so there is absolutely no guidance from this Court in this area. Petition at 15-16. Second, the legislative history cited by Justice Rehnquist in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 644 (1973) and the legislative history of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) support that Congress intended an airport proprietor to regulate the ground space of its airport. This legislative history supports that the airport proprietor is the entity intended to determine whether the facilities – such as security to protect users and baggage facilities – are available to accommodate scheduled passenger service. Petition at 16-18. Third, in the vacuum of any guidance from this Court, the FAA is now expanding into areas traditionally left to the airport proprietor, thus resulting in the present conflict.

As one commentator has noted, these ground space/facility decisions had traditionally been left to the airport proprietor. The FAA now encroaches into this area previously reserved for airport proprietors by seeking to impose an aeronautical use on an airport even if the facilities are not available. Petition at 13-15. In this case, it means that the Airport Authority, which was not designed or constructed for scheduled passenger service, lacking even in the basic security to protect users, must allow scheduled passenger service or be denied eligibility for federal funds. The FAA continues to reject, post September 11, 2001, the Airport Authority's position that these facilities are necessary because "the Authority had

failed to explain why such facilities were necessary or required." Brief in Opposition at 18. (citation omitted). From the Airport Authority's perspective, the FAA not only ignored the Airport Authority's and the Colorado Supreme Court record but also ignored common knowledge that commercial airports such as Logan International Airport, LaGuardia Airport, Ronald Reagan Washington National Airport, Washington Dulles International Airport and Denver International Airport operate with terminals, parking, baggage facilities and security – one could not comprehend that they would do otherwise.[3] The Airport Authority is astounded that post September 11, 2001, the FAA would maintain this position. The Colorado Supreme Court recognized in 1998: "Without these facilities, the airport would become unsafe for passenger use." *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 596 (App. at 83).[4]

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[3] The FAA also continues to comment that the Airport Authority allows unscheduled operations with similar aircraft. Brief in Opposition at 18. As noted, for scheduled passenger service certain facilities are necessary for the safe operation of the airport, such as security and baggage facilities.

[4] There is one final matter which the Airport Authority wishes to note. The Brief in Opposition erroneously states that the Airport Authority erroneously cites to 14 C.F.R. Part 152, App. D ¶ 18. ("Part 152"). *See* Brief in Opposition at 3 n.2. The Airport Authority disagrees. The record establishes that the Airport Authority's grant agreements date to 1967 and totaled $30.1 million as of the Colorado Supreme Court opinion. *See Arapahoe County Pub. Airport Auth.*, 956 P.2d at 589, 600 (App. at 63-64, 92). The Airport Authority's grant agreements pertaining to land acquisition remain in effect. The Final Agency Decision

CONCLUSION

For the reasons set forth herein, and its Petition for Writ of Certiorari, the Airport Authority respectfully requests that its Petition for Writ of Certiorari be granted.

Dated November 15, 2001.

Respectfully submitted,

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and Order did not limit the grants at issue nor the applicability of Part 152. *See* App. at 23-59. The grant agreements and Part 152 support the Airport Authority's proprietary power to ban scheduled passenger service as necessary for the safe operation of the airport and to serve the civil aviation needs of the public. Further, Part 152 has not been superseded or repealed. *See* Airport and Airway Improvement Act of 1982, Pub. L. 97-248, § 523(c)(1), 96 Stat. 695 (1982) ("All . . . regulations . . . which have been issued, made, granted, or allowed to become effective by the . . . Secretary . . . or any provision of the Airport and Airway Development Act of 1970 . . . which are in effect at the time this title takes effect, are continued in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary . . . or by operation of law.") Part 152 remains in effect today. *See* 14 C.F.R. Part 152, App. D. ¶ 18 (2001). The regulation now cites, in part, as its authority, 49 U.S.C. § 47106. *See* 14 C.F.R. Part 152 (2001) at 129. 49 U.S.C. § 47106(d) is relied upon by the FAA to assert that the Airport Authority is ineligible to apply for new FAA grants. *See* App. at 58. The Brief in Opposition, thus, is both factually and legally incorrect.